

EXHIBIT B

PART 3

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Pages from Fleming's Reply Brief.pdf Pages from 9th Circuit Memo.pdf

Michael Baumann/Los
Angeles/Kirkland-Ellis
01/29/2008 12:29 PM

To "Tim Hogan" <tjh@timhogan.com>
cc "Erin Brady" <ebrady@kirkland.com>, "Richard Wynne"
<rwynne@kirkland.com>
bcc Wade Ackerman/Los Angeles/Kirkland-Ellis
Subject RE: Robert Kors' Admission

Tim:

Your response did not address the point I made. In both your December 2004 letter, and in court filings, you and Mr. Berry have acknowledged that the license agreement was rejected by the debtor. The claim that the license was not rejected in the bankruptcy is untrue. Nothing in your explanation below provides any reason for naming Mr. Kors in his individual capacity in the claim. I suggest you agree to drop the claim or, as with the conversion and breach of duty claims, we will have no choice but to seek sanctions.

I read with interest Lex Smith's declaration. Given the declaration, there appears to be no basis for your continued assertion of the claim that client funds were converted, that a lien was purchased from your former firm, or that anyone acted to cause process to be served on Mr. Berry in his divorce case other than his wife. More particularly, there is certainly nothing in the declaration that would explain or justify an accusation that Mr. Kors or the PCT aided in any alleged misconduct and you have refused to provide any basis for naming the PCT or Mr. Kors in these counts. Again, unless you withdraw these claims against the PCT and Mr. Kors, we will seek leave to file a Rule 11 motion.

Mike

"Tim Hogan" <tjh@timhogan.com>



"Tim Hogan"
<tjh@timhogan.com>
01/28/2008 03:31 PM

To "Michael Baumann" <mbaumann@kirkland.com>, "Erin
Brady" <ebrady@kirkland.com>
cc "Richard Wynne" <rwynne@kirkland.com>
Subject RE: Robert Kors' Admission

Mike:

When you use the term "rejection" I think you are using a term of art the implication of which you may not understand.

"Termination" of license simply results under well settled authority in the loss of any defense to infringement civil and criminal for continued use after "termination." I note that Mr. Kors has confirmed to me the continued use after termination and I'm confirming again to you the lack of any defenses. I know of no rejection effected by the PCT and therefore in my view it remains liable to Mr. Berry for an accruing liability.

"Rejection" is a term of art related to "executory contracts" in the bankruptcy setting specifically 11 U.S.C. Sec. 365. I'll put the terms of art in quotes.

Fleming and C&S have been unable to "assume" and "assign" the Berry EULA where the basis of the "assumption" and "assignment" is that Berry should get nothing, and at the same time unwilling to "reject" the EULA under the erroneous view that by refraining from doing so, the players are protected ongoing

infringement liability. The "termination" letter was sent to make clear that none of these defenses continue, but had nothing to do with "rejection" as a Bankruptcy term of art as your email implies. Throughout the Bankruptcy and the Second Hawaii case your firm's client claimed to be the holder of a license that was not "rejected" or "terminated" and that defense protected the client from willful infringement liability but also now sets up a judicial estoppel.

Because Mr. Berry obtained "relief from stay" "prior to confirmation", he was free to "terminate" and did so. Mr. Berry has never sought "rejection" in part because leaving the PCT on the hook seemed like a good idea at the time and it still does. You can check with Mr. Wynne, but the "termination" and even a "rejection" would not affect the contract rights under the "executory contract," in this case, the EULA and its addenda, to seek specific performance or the liquidated damages set forth therein if performance is not possible. If Mr. Wynne is trying to hook up Section 365(n)(1)(B) please advise him he is chasing a red herring. That section applies where the debtor is a "licensor" not a "licensee" as in this case. Fleming's "license" prohibited any rights to license Berry's works under any circumstances.

Because the PCT continues to support C&S's illegal use, the PCT continues to accrue administrative. Also, as to "rejection", you might remember that prior to his escape to Minnesota, Mr. Liebler had been dealing with "assumption" related issues with C&S for many years, well past confirmation. Based on the recent status report Mr. Wynne has admitted that the only remaining issue related the Mr. Liebler's former charge is poor old Mr. Berry and the hot software Fleming sold on your Firm's watch.

I trust this will demonstrate that any Rule 11 request will give rise to a violation of Rule 11. If you do not agree, please advise me of the specifics of your disagreement and I will respond according.

Regarding your other threats, what did you think of Lex' declaration?

Regards,

Tim

Timothy J. Hogan

Attorney at Law

1050 Bishop Street, No. 433

Honolulu, Hawaii 96813

Tel (808) 382-3698

Fax (808) 356-1682

Email tjh@timhogan.com

www timhogan.com

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From: Michael Baumann [mailto:mbaumann@kirkland.com]

Sent: Monday, January 28, 2008 9:38 AM

To: Tim Hogan

Cc: Erin Brady; Jonathan Moskin; Richard Wynne

Subject: RE: Robert Kors' Admission

Tim:

I want to raise another issue with you before sending a letter to the Court seeking permission to file a Rule 11 motion. The new complaint alleges that a license agreement between Mr. Berry and Fleming may be specifically enforced against the PCT and/or Mr. Kors because the agreement was not rejected in the bankruptcy. You wrote a letter on behalf of Mr. Berry specifically stating that the license agreement had been rejected. In addition, the bankruptcy confirmation plan and order made clear that all agreements not assumed were rejected--presumably the source for the statement in your letter. It is apparent that the premise for the claim for specific performance is wrong and that it was known to be wrong at the time the allegation was made. Are you willing to withdraw the allegation and claim? If not, can you please explain on what basis you are taking this position?

Mike

"Tim Hogan"
<tjh@timhogan.com>

01/18/2008 03:09 PM

To: "Michael Baumann" <mbaumann@kirkland.com>
cc: "Erin Brady" <ebrady@kirkland.com>, "Richard Wynne" <rwynne@kirkland.com>, "Jonathan Moskin" <jmoskin@ny.whitecase.com>
Subject: Robert Kors' Admission
ect

Mike:

It is apparent that you are engaged in discovery by threatening sanctions. I will produce evidence in this case as required by the rules, the PCT and the Lenders' threats notwithstanding. If you have a discovery request, make it under the rules. If you file a motion I will respond. I am copying Mr. Moskin to insure that you are acting under the Lenders' authority.

Tim

From: Michael Baumann [mailto:mbaumann@kirkland.com]
Sent: Friday, January 18, 2008 11:57 AM
To: Tim Hogan
Cc: Erin Brady; Richard Wynne
Subject: RE: Robert Kors' Admission

Tim:

What did they say to you when you investigated the allegations before filing the complaint? As expected, you had no answer to my questions regarding the basis for your claims. Unfortunately, absent withdrawal of the claims, sanctions will be sought.